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**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1943

No. 608

CHARLES B. VAN DUSEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

REPLY BRIEF FOR PETITIONER

**JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
RAYMOND H. BERRY,
ARTHUR L. EVELY,**
Counsel for Petitioner.



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INTRODUCTORY STATEMENT

On January 15, 1944, petitioner filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and a brief in support thereof. On February 8, 1944, the respondent filed a brief in opposition to the granting of this petition. This brief is filed by petitioner for the purpose of replying to the arguments set forth in respondent's brief in opposition.

ARGUMENT

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case.

Respondent in his brief in opposition denies petitioner's contention that the decision of the United States Circuit Court of Appeals for the Sixth Circuit in this case is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Jergens*, 127 Fed. (2d) 973. He bases his argument on the assertion that the facts in the two cases are different. It is true that the detailed provisions of the two trusts differ and these differences were pointed out in petitioner's original brief. However, both the trust in this case and the trust in the *Jergens* case were irrevocable insurance trusts in which the policies were not on the life of the grantor, and in which the insurance premiums were to be paid from the trust income. The excess income of the trusts, if any, was payable to the grantors, in the *Jergens* case by the terms of the trust instrument and in the instant case at the discretion of trustees, who were adversely interested. In other words, all of the facts which are material to the application of Section 167(a) of the Revenue Acts of 1936 and 1938 to these trusts were substantially the same in the two cases. Respondent does not refer to any factual difference between the two cases which has any bearing on the application of this section. Nevertheless, the Circuit Court of Appeals for the Sixth Circuit determined that the income of the trust here in

question was taxable to the grantor under Section 167(a) in direct conflict to the decision of the Court in the *Jergens* case.

Moreover, respondent goes on to argue that the decision of the Circuit Court of Appeals in this case is in accordance with the principle established by this Court in *Helvering v. Clifford*, 309 U. S. 331. To support such a contention he must argue that the grantor of this trust retained some control over it or some economic benefit derivable from it. He does in fact assert such economic benefit, ignoring the fact that The Tax Court, in its findings of fact in this case, did not find that the grantor had retained or could derive any economic benefit from the establishment of the trust and did not find any fact which would support a decision that the grantor was taxable as to the income of the trust under Section 22(a) of the Revenue Acts of 1936 and 1938. Consequently, it may fairly be said that the Circuit Court of Appeals for the Sixth Circuit, in determining that the grantor was taxable under Section 22(a) in the absence of a finding of fact by the lower Court of any of the characteristics which have caused other Circuit Courts of Appeals to apply the *Clifford* principle, was in conflict with the decision not only in the *Jergens* case but in other cases decided under the principle of the *Clifford* case.

Respondent argues that the Van Dusen Trust was a family trust resulting merely in "a temporary reallocation of income within an intimate family group". It may be pointed out, however, that the trust in the *Jergens* case was likewise a family trust set up by a wife for the benefit of her husband, containing insurance policies on his life and providing for the distribution of the corpus to the husband, if living at the termination of the trust upon

the death of the wife. The Circuit Court of Appeals for the Fifth Circuit, reviewing these facts, determined that the grantor had retained no economic benefit in the trust and that she was not subject to taxation under Section 22(a). Such decision is, it is submitted, in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in this case.

2. The trusts here involved were not reciprocal trusts since neither spouse benefited from the trust set up by the other.

Respondent contends that the insurance trusts created by the petitioner and his wife each provided a reciprocal benefit for the other spouse, because "the trust of each spouse was used to pay the premiums on the life insurance of the other spouse". He concludes that "this constituted a benefit to the one whose life insurance was paid" (Br. 8). Respondent misunderstands the facts. The trust created by the petitioner was not for the purpose of paying premiums "on the wife's life insurance", (Br. 6) since the insurance policies placed in his trust by petitioner were his own property. They were in no sense his wife's life insurance. Petitioner's wife was merely the insured under the policies placed in the trust and had no incident of ownership or economic interest in them. She could, therefore, derive no benefit from the fact that her husband had set up a trust, the income of which was to be used to pay the premiums on these life insurance policies which *she did not own*. The same situation is true of the trust created by petitioner's wife.

Neither spouse, therefore, received or could receive any direct economic benefit from the trust created by the

other spouse. The only benefits accruing from the creation of these trusts were the benefits resulting from the building up of an estate for the children of the two settlors. It is even immaterial that the property in which this estate was invested was insurance. If such an economic benefit warrants the taxation of the trust income to the settlors in this case, then it would follow that the income of every family trust created by the parents for the ultimate benefit of their children, regardless of the nature of the investment of the trust corpus, should be taxable to the parents who created it.

3. If, as respondent contends, this case must be decided "on its own peculiar facts", then the Circuit Court of Appeals for the Sixth Circuit erred in reviewing the Tax Court's determination of the facts and reversing its decision.

In attempting to distinguish this case from the *Jergens* case respondent argues vigorously that the facts of the two cases are different and states, quoting the decision in the *Jergens* case, that "each case depends for decision on its own peculiar facts". If respondent is correct in taking this position, then it follows that the Circuit Court of Appeals for the Sixth Circuit in reversing the decision of The Tax Court must have substituted its own interpretation of the facts for the factual determination made by The Tax Court. That Court, as already stated, had made no findings of fact upon which an application of Section 22(a) could be predicated. This action, it is submitted, is in contravention of the principle of finality in The Tax Court's findings of fact recently re-emphasized by this Court in its decision in *Dobson v. Commissioner of Internal Revenue*, decided December 20, 1943.

Respondent attempts to extricate himself from this position by the statement that the Court accepted the Board's findings and merely "reversed the Board on a question of law" (Br. 8). If, however, the Circuit Court of Appeals for the Sixth Circuit merely accepted the findings of fact made by The Tax Court, it either had no basis for the decision which it reached, or arrived at that decision by enunciating a principle of law in conflict with the decision in the *Jergens* case. In so far as the Court based its decision on an application of Section 167(a), it necessarily reached a decision in conflict with the decision of the *Jergens* case. In so far as it based its decision on an application of Section 22(a), it did so on findings of its own based on a redetermination of the facts before it, since, as already pointed out, there were no findings of fact by The Tax Court supporting such a conclusion.

CONCLUSION

WHEREFORE, it is respectfully urged that the petition of Charles B. Van Dusen for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
815 Fifteenth Street N. W.,
Washington, D. C.

RAYMOND H. BERRY,
ARTHUR L. EVELY,
1000 Penobscot Building,
Detroit, Michigan.
Counsel for Petitioner.

